

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Thomas S. Hixson, Magistrate Judge
4

5 UNITED STATES OF AMERICA,) No. C 22-03070-TSH/
6 Plaintiff,) 23MC80245-TSH
7 vs.)
8 TWITTER, INC.,)
9 Defendant.)

10
11 San Francisco, California
12 Thursday, November 16, 2023
13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
14 RECORDING 11:03 - 11:54 = 51 MINUTES

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1 Thursday, November 16, 2023

11:03 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

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4 THE CLERK: Calling civil action 22-03070, United
5 States of America versus Twitter, Inc., and civil Action
6 23-80245, X Corp versus Ernst and Young LLP. The Honorable
7 Thomas S. Hixson presiding.

8 Counsel, please step forward and state your appearances
9 for the record.

10 THE COURT: Let's start with the government.

11 MR. COWAN: Good morning, your Honor. Zach Cowan
12 for the Plaintiff.

13 THE COURT: Good morning.

14 MS. HSIAO: Good morning, your Honor. Lisa Hsiao
15 for the United States.

16 THE COURT: Good morning.

17 MR. KOFFMAN: Good morning, your Honor. Daniel
18 Koffman, Rachel Frank, and Quinn Emmanuel on behalf of X
19 Corp.

20 THE COURT: Good morning.

21 And do we have counsel for Ernst and Young here?

22 MS. VANDRUFF: Hi. Good morning, your Honor.
23 Laura VanDruff on behalf of (indiscernible).

24 THE COURT: Good morning.

25 X Corp, we are here on your motion, so please proceed.

1 MR. KOFFMAN: Can I approach the lectern?

2 THE COURT: Yes, please.

3 MR. KOFFMAN: Thank you, your Honor.

4 We're here under extraordinary circumstances involving
5 uncommon, alarming conduct by a government agency under the
6 auspices of an order that they asked this Court to answer.
7 They came to this Court having settled a dispute with
8 Twitter. They asked this Court to answer it, and then they
9 have engaged in conduct that strikes at the heart of that
10 agreement. It strikes at the heart of this Court's order.

11 And I think it's worth -- I know your Honor has read
12 the briefing and is familiar with the issues, but I think it
13 is useful to explain why this is so important and why this
14 is so -- this conduct is so insidious, because the
15 independent assessor provision in the consent order is this
16 -- the independent assessor occupies a special role. It is
17 supposed to be a neutral third party. In the FTC's words,

18 "It's supposed to be truly objective,
19 that is unaffected by the interests or
20 litigation positions of either the
21 respondent or the FTC."

22 Those are their words. And what we now know is that
23 the FTC has violated that provision and that they have
24 corrupted this process. And the record on this could not be
25 more clear. The lead engagement partner from Ernst and

1 Young testified that he felt as if the FTC was trying to
2 influence the outcome of the engagement before it had
3 started. He testified,

4 "In some of the discussions that we were
5 having with the FTC, expectations were
6 being conveyed about what those results
7 should be before we had even begun any
8 procedures."

9 He was asked directly,

10 "No one from the FTC directed you to
11 reach a particular conclusion about
12 Twitter's program, correct?"

13 And his response was,

14 "There was suggestions of what they
15 would expect the outcome to be."

16 He testified that,

17 "The FTC had given us a list of
18 specificity of the types of procedures
19 they were expecting us to execute. And
20 they also said -- that was the meeting
21 where it was communicated that they
22 would expect Ernst and Young to have
23 findings or expectations or negative
24 results."

25 Your Honor, this is devastating. This is devastating

1 evidence. This is not normal. This is not routine. These
2 are not the expectable results of an adversarial litigation
3 as the government now suggests. This strikes at the heart
4 of the settlement that the parties reached, and it strikes
5 at the heart of an order that they asked this Court to
6 enter.

7 So that's the backdrop for this motion. And I think
8 it's an important context for these sort of procedural
9 roadblocks that the government tries to erect now, which I
10 want to address in a minute. But just fundamentally, it
11 cannot be that the FTC can come to your Honor, invoke this
12 Court's authority to order a settlement, violate that
13 settlement through conduct that is beyond the pale, and then
14 say, "Actually, judge, sorry. We asked you to enter the
15 order, but you have no power to do anything." That can't be
16 right.

17 So to address the procedural issues and kind of the
18 government's attempt to divest the Court of jurisdiction
19 here, I don't think that these arguments need to detain the
20 Court long. The consent order on its face is incorporated
21 into the stipulated order. It was one document. And that
22 was by design. They had to do that. And the reason they
23 had to do that is because they wanted special remedies that
24 only a district court could order. The FTC can't impose a
25 civil penalty on its own. It can't obtain an injunction on

1 its own. So it came here, it asked the Court to enforce
2 this -- to enact this settlement and order the settlement --
3 order Twitter -- now X, but at the time Twitter -- to pay
4 the penalty and to be subject to this court ordered consent
5 order, so that later on if the FTC determine that X had
6 violated the consent order, they could come back and seek
7 contempt. It's what they do.

8 So to say now that, you know, they asked the Court to
9 enter the order, but now when they violated it, you have no
10 power to enforce it, that argument is -- it's incoherent,
11 and it would produce absurd result, because if they
12 determine that X violated the order, they certainly would
13 come back here and say to your Honor, "They violated your
14 order. Hold them in contempt, compel compliance, impose a
15 contempt sanction." So when X violates the order, the Court
16 has power. When they violate the order, the Court doesn't.
17 I admire the creativity of the argument, but I don't think
18 it can withstand scrutiny.

19 So as to the -- this sort of ultimate --

20 THE COURT: Well, let me ask you a question.

21 MR. KOFFMAN: Yes.

22 THE COURT: So on May 26, 2022, I entered the
23 stipulated order, and then the same day the FTC issued its
24 -- the consent order. What if I completely vaporized my May
25 26 stipulated order? Would X Corp still be obligated to

1 comply with the FTC's consent order?

2 MR. KOFFMAN: No. Well, they wouldn't have the
3 remedy that they currently have, which is to come here and
4 ask the Court to compel compliance or to further penalize X
5 for a violation of the consent order.

6 So that's effectively the relief we're seeking and the
7 relief that we believe is justified on the facts as we
8 understand them, which is to say that -- we're not asking
9 your Honor to go rewrite the consent order. All we're
10 seeking is an order recognizing that having asked this Court
11 to order the consent order, they can't -- and then they
12 engage in the conduct they've engaged in and blatantly
13 violated the order, they can't come back to Court and say,
14 "Judge, they -- X Corp violated the consent order, so
15 therefore you should hold them in contempt, or you should
16 find that this is a further violation of the FTC Act."

17 THE COURT: Well then let me ask you another
18 question. If X Corp did violate the consent order, could
19 the government ask me to hold them in contempt? In other
20 words, does the stipulated order require X Corp, or formerly
21 Twitter, to comply with the FTC's consent order?

22 MR. KOFFMAN: I have no doubt, your Honor, that
23 that is exactly the relief they would be seeking, because
24 they do it in other cases. There are other cases where
25 there's a consent order, and the FTC comes back to Court and

1 says, "Judge, the defendant violated the consent order.
2 Hold them in contempt." That's one of the reasons why they
3 went through this procedure. They didn't have to come to
4 Court. Recall that the 2011 consent order, there was no
5 district court action. There was a consent order. The FTC
6 determined that Twitter had violated the 2011 order.
7 Twitter at the time decided to settle. They didn't contest
8 it. And at that point, so that they could get the penalty
9 -- they could get the injunction and have that ability to
10 come back and seek contempt sanctions, that's why they came
11 to district court. So I have no doubt that at the end of
12 this investigation, that if it's allowed to go on in its
13 present form, they will come back to Court and say, "There
14 are violations of the FTC Act. They violated the consent
15 order, penalize them, hold them in contempt."

16 So on the merits, on sort of the rupo (phonetic)
17 factors, I think the record here is pretty clear. This
18 conduct that the FTC has engaged in itself is a changed
19 circumstance under rupo. It is also probative of the bias
20 and prejudgment of the investigation -- of the FTC's
21 investigation, which itself is also a changed circumstance.

22 The consent order gives the FTC special discovery
23 powers. It gives them the ability to take these
24 depositions. It gives them the ability to demand documents
25 and information under penalty of perjury on a 14-day

1 turnarounds. And X has spent millions of dollars complying
2 with those provisions. I can tell you firsthand experience
3 a year ago, responses due the day before and the day after
4 Thanksgiving, responses due December 23rd, December 27th.
5 Within the first seven weeks after the change in control of
6 Twitter, the FTC had propounded more than 140 requests for
7 documents and information for what we now know is not a good
8 faith compliance examination, but is part of this effort to
9 create a record that will support a preordained outcome. If
10 that's not something that is substantially more onerous or
11 unworkable, I'm not sure what is. And certainly X -- if X
12 had known that within five months and after Elon Musk, this
13 (indiscernible) of the regulatory state and a vocal critic
14 not only of the FTC but of the Biden administration, that as
15 soon as he took over the company, they would go from one
16 type of investigation to evidence in search of a result,
17 they never would have agreed to this settlement. That's not
18 a settlement.

19 So I think on the first two rufo conditions,
20 substantially more onerous or unworkable. I think these
21 facts clearly support that.

22 Certainly on the third factor, the public interest --
23 at a time, your Honor, when public faith in government and
24 public institutions is at perhaps an all-time low, it cannot
25 be that government agencies can engage in this kind of

1 conduct and then continue to enjoy the benefits of orders
2 that they obtained under the authority of an article
3 (indiscernible). If they don't play by the rules of -- and
4 if they violate their own agreements, then they shouldn't be
5 able to continue to enjoy the benefits of those agreements.
6 And that -- that's what we're asking for. To be clear,
7 we're not saying they can't investigate X, they can't
8 investigate Elon Musk. Let them issue a CID. Let them send
9 out their representative to pose as consumers.

10 We're also not saying that X should have no obligation
11 to have a privacy program. X has made commitments to users.
12 It has to live up to those commitments, subject to other
13 legal regimes that require privacy and information security
14 protocols. So we're not saying X should just be able to
15 open the floodgates and let the hackers in, not that at all.
16 And we're also not saying that X should be allowed to
17 violate the FTC Act. If they want to come to court and say
18 that the company violated the FTC Act, we can litigate that.
19 All we're saying is that the FTC cannot invoke this Court's
20 authority to enforce a settlement that they themselves have
21 violated and continue to abuse in the most unusual
22 circumstance. Their conduct -- what that conduct means
23 about their investigation means that they cannot invoke this
24 Court's authority to compel compliance or to punish
25 non-compliance with this order. So -- and that -- I can't

1 imagine any legitimate argument that your Honor doesn't have
2 the ability to issue that.

3 Just to touch briefly on the deposition and then the
4 discovery. So on our motion to quash the deposition of Mr.
5 Musk, I think for all the reasons laid out in the papers and
6 that I've just gone through, I think it follows that this is
7 -- it's both -- part of this improper investigation. I
8 think it's a tactic. The guy was on the job for six weeks
9 when they issued the first notice of deposition. He
10 practically didn't -- he's still trying to figure out where
11 to get a Diet Coke, and they're saying, "We wanted to talk
12 to you." I don't think that that's right. I also think
13 that it clearly violates the Apex doctrine. The government
14 says the Apex doctrine doesn't apply. That's not correct.
15 The deposition was issued under this Court's name with this
16 case caption. The Apex doctrine applies to any civil case,
17 and it applies here. And they clearly have not exhausted
18 alternative avenues to obtain the (indiscernible).

19 On discovery -- I'll sort of put the motion to compel
20 to one side for a minute. But just to explain what's going
21 on here, this is not a fishing expedition. We've been able
22 to see only a small sliver of the record here. It's only
23 the documents that the FTC chose to introduce at the
24 deposition of the E and Y engagement lead. What we've seen
25 in those documents and in his testimony is evidence that

1 there are other conversations going on about positions
2 within E and Y. So we're just -- we're following the
3 evidence.

4 And one especially important piece of that is the
5 testimony about the second meeting with the FTC that Mr.
6 Roque did not attend. He testified that only an Ernst and
7 Young in-house counsel attended that meeting. And, your
8 Honor, we have reason to believe that at that meeting, the
9 FTC continued to dictate what it expected Ernst and Young to
10 do, specific things that it was demanding Ernst and Young do
11 that Ernst and Young said, "We're not prepared to do that.
12 And if you insist that we do it, we would likely have to
13 resign." And that when Ernst and Young communicated that,
14 the FTC began to threaten them, and said things like, "We
15 don't want to be at odds with you." So --

16 THE COURT: So in your papers you refer to Mr.
17 Roque testified about one meeting, but what you're saying
18 now is there was likely another one that he wasn't present
19 at?

20 MR. KOFFMAN: That's right.

21 THE COURT: Okay.

22 MR. KOFFMAN: He testified that he knew that that
23 meeting occurred and that Ernst and Young in-house counsel
24 attended. And when I sought to examine him about
25 communications that that lawyer may have made to him, purely

1 factual, just repeating what the FTC said, Ernst and Young's
2 counsel objected on privilege ground. I disagreed with
3 those objections. We can get into that. But the point is
4 that we know the meeting happened, and I'm proffering to
5 your Honor that we have reason to believe that the FTC made
6 clear threats during that meeting when E and Y said, "If we
7 -- if you tell us that we have to do this, we may have to
8 resign."

9 So -- again, not a fishing expedition. And I am
10 confident that -- I think that the record satisfies rupo as
11 it is. To the extent your Honor is not yet certain, I'm
12 confident that additional discovery about that second
13 meeting will lead to material additional evidence that bears
14 on this question.

15 So I think, as I said, the record establishes gross
16 misconduct by the FTC. That misconduct easily meets any one
17 of the three rupo conditions. And so in the exercise of
18 your equitable discretion, what we would seek from your
19 Honor is an order that the FTC cannot obtain relief based on
20 an alleged violation of the consent order.

21 THE COURT: Okay. All right. Thank you. If you
22 would like -- you want to reserve your remaining time for
23 responding?

24 MR. KOFFMAN: Please. Yeah.

25 THE COURT: Okay.

1 Let me hear from the government.

2 MR. COWAN: May I approach?

3 THE COURT: Yes, please.

4 MR. COWAN: Good morning again. Your Honor, the
5 FTC Act authorizes the FTC at section 5(b) to issue
6 administrative orders requiring corporations to cease and
7 desist from using unfair and deceptive trade practices. It
8 also authorizes the commission to modify those orders when
9 it determines that it's in the public interest to do so.

10 And in 2022, the FTC did just that. And it issued a
11 modified administrative order against X Corp with X Corp's
12 consent as a part of the settlement in this lawsuit. But
13 now, your Honor, using Rule 60(b), X Corp seeks to revoke
14 that consent and evade the settlement agreement and the
15 administrative process to which it agreed just one year ago.
16 It cannot do so for three reasons.

17 First, your Honor, an administrative order can't be
18 modified under Rule 60(b). Congress specified another
19 pathway under the FTC Act whereby a petitioner must go to
20 the commission and ask to have the order modified or vacated
21 with judicial review occurring of that decision thereafter.

22 Second, your Honor, and regardless, X Corp's
23 contentions fail to meet the threshold showing required
24 (indiscernible).

25 And, finally, X is not entitled to a protective order

1 to stop Mr. Musk's depo because he has firsthand knowledge
2 about evidence that is highly relevant to the FTC's
3 investigation.

4 THE COURT: Let me ask you a question. If the FTC
5 thought that X Corp violated the FTC's administrative order,
6 could you ask me to impose contempt sanctions?

7 MR. COWAN: Not as a part of this lawsuit, your
8 Honor. And -- now, perhaps under section 5(l), they could
9 bring another lawsuit. But if it's purely under the
10 administrative order, the Supreme Court has been pretty
11 clear about this that you cannot. And so this came up on
12 reply, so the government hasn't really had an opportunity to
13 address this.

14 So I just want to clarify a couple of points there.
15 First of all, it has happened before where there has been
16 concurrent administrative and judicial proceedings in
17 connection with the same administrative order. So one
18 really good example of that is the Louisiana-Pacific cases
19 that occurred in the Ninth Circuit and where the case was
20 remanded back to the agency to make particular findings,
21 recognizing that there's that parallel track that's
22 occurring between the two cases. So just -- that is a
23 baseline.

24 But then, your Honor, there is a case called Kokkonen,
25 which is very clear -- and I brought a courtesy copy for

1 your Honor to the extent that your Honor would like it. The
2 Supreme Court has been very clear that the jurisdiction of
3 courts to enforce the settlement are limited by the terms to
4 which the parties agreed. So there's three cases that I
5 would point your Honor to. One is Kokkonen. And, again, I
6 could give you copies, and I have copies for counsel as
7 well. But that 511 U.S. 380 and 81, Pigford, which is a
8 D.C. circuit case, 777 F.3d 514, and Kelly, which is a Ninth
9 Circuit case, 822 F.3d 1095. All of these cases stand for
10 the proposition that the Court's jurisdiction to limit -- to
11 enforce settlement agreement is limited to the express terms
12 to which the parties agreed.

13 Section four is the retention provision of the
14 stipulated order. And that provision is very clear that the
15 Court retained jurisdiction to enforce the stipulated order,
16 not the administrative order or the administrative
17 proceedings that were listed elsewhere in the order which
18 were in section two. And this was a very intentional
19 decision by the parties. Section two through section two,
20 the parties requested, and the Court ultimately ordered,
21 that X shall consent to reopening of the administrative
22 process and a modification as set forth in attachment A.

23 THE COURT: In other words, is it the government's
24 view that this is not a judicially supervised consent order?

25 MR. COWAN: That -- the administrative order is

1 not, your Honor. Not in that respect. Now, for example, if
2 X Corp had refused to provide consent to enter the order
3 after --

4 THE COURT: Oh, sure. Because that's in the
5 stipulated order, yeah.

6 MR. COWAN: Exactly, yes. Something would have to
7 be precisely in the stipulated order. And attachment A was
8 incorporated for more limited purpose such as that we just
9 discussed, your Honor. So, yes, unless it was somehow
10 violative of something that was particularly in the
11 stipulated order, the parties chose to use the
12 administrative process that Congress provided under the FTC
13 Act.

14 THE COURT: And the stipulated order does not say
15 that Twitter must comply with the consent order, correct?

16 MR. COWAN: That's right. And, your Honor, this
17 was done also for very a intentional reason. Similar to
18 what happened when this lawsuit was filed, now one potential
19 benefit of having a new administrative order issued was that
20 under section 5(1), to the extent that X Corp failed to
21 comply, the government could seek a new lawsuit, including
22 for civil penalty or for injunctive relief or whatever else,
23 pursuant to that statute.

24 So there are benefits to perhaps using either pathway,
25 including contempt if it would have been in the stipulated

1 order. As counsel mentioned it, sometimes the government
2 does use a stipulated order to bring contempt actions. But
3 to the extent that it's an administrative order, the pathway
4 would be through section 5(1) of the FTC Act to bring a new
5 action.

6 So, your Honor, that essentially explains our position
7 with the stipulated order. And would you like a copy of the
8 cases that I mentioned?

9 THE COURT: I don't think I need copies of cases
10 that stand for the proposition that parties are bound by the
11 terms that they agreed to.

12 MR. COWAN: Okay.

13 THE COURT: I've got that --

14 MR. COWAN: Understood --

15 THE COURT: -- proposition.

16 MR. COWAN: Understood. Just moving now to the
17 second argument in terms of Rule 60(b), essentially X Corp
18 relied on changed factual circumstances to suggest that the
19 order should be modified. Those are -- there are three
20 elements to a 60(b) request for modification. One, you have
21 to show a significant change in the circumstances. It has
22 to be onerous. You have to make compliance more onerous or
23 against the public interest or unworkable. And finally --
24 but you have to show that that change is suitably tailored.

25 I want to start with the tailoring component and the

1 onerous component because there's -- X devote essentially
2 very little argument to either. In terms of the tailoring
3 argument, your Honor, X Corp really doesn't argue at all
4 that its proposed modification of the complete termination
5 is tailored to the circumstance. And, in fact, its reply
6 almost implicitly concedes that that wouldn't be
7 sufficiently tailored because finally on reply, it says
8 perhaps the Court should just remove the assessment
9 provision and the compliance monitoring provision. But even
10 that argument doesn't really explain how that modification
11 would be tailored. In terms of the assessment, X Corp is
12 essentially on (indiscernible) on the new assessment to say
13 that it's fully vindicated. So if it truly didn't believe
14 that it could get an independent assessment, then it
15 wouldn't -- then perhaps that isn't appropriately tailored.

16 But the other one, your Honor, in terms of discovery,
17 the FTC also has power under its own administrative powers
18 to issue civil investigative (indiscernible) and so forth to
19 obtain discovery as a part of its administrative
20 investigation. So it's unclear how even removing that
21 provision would be suitably tailored to fix the problems of
22 which it (indiscernible).

23 Essentially, the unworkability argument suffers from
24 the same flaw, mostly conclusory. And to the extent that
25 the -- that X Corp claiming that the FTC's discussions with

1 EY had been (indiscernible) tainted the investigation --
2 it's hard to reconcile that with the reliance on the new
3 report as a part of its position in this case.

4 There was some mention today also of a modification
5 being in the public interest. I just want to be clear, just
6 as the Second Circuit said when Mr. Musk filed for
7 modification against the FTC, there are benefits, first of
8 all, in enforcing consent decrees. The public interest is
9 in enforcing consent decrees. And, also, there's a public
10 interest in following the law and ensuring the laws are
11 enforced here. And that would be laws protecting against
12 unfair and deceptive trading practices.

13 Finally, just to go to the first element for a few
14 minutes in terms of factual circumstances, they've
15 essentially relied on two bulk reasons that there should be
16 modifications.

17 The first deals with Mr. Roque's testimony. Honestly,
18 your Honor, reading it, it appears to be a hyperbolic spin
19 on the testimony. I mean, there -- Mr. Roque at the
20 testimony, after being examined by Mr. Koffman as well, was
21 very clear that in December 2023, FTC was very clear that
22 they expected him to issue a report -- that EY issue a
23 report. And also they requested specific procedures that
24 would be a part of that. The January 2023 meeting also said
25 the FTC said, based on a full investigation, it would be

1 surprised and would follow up if they didn't find some
2 adverse findings.

3 Your Honor, there's nothing in the order that would
4 prohibit those communication. There's nothing that says the
5 FTC can't communicate its expectations. And that is
6 consistent with the administrative order. One, the FTC's
7 right to approve the assessor seems to imply that it can
8 expect (sic) that accessory issue an order. And second, the
9 assessor is specifically required to give evidence and
10 explanation for what justifies its finding. There's nothing
11 inconsistent with the FTC providing its expectation about
12 what sort of evidence might meet that standard.

13 THE COURT: Well, let me ask you this, even if the
14 FTC's conduct did not violate the administrative order, is
15 this -- in your experience, is this type of expectation
16 setting by the FTC to an independent assessor, is that
17 common? Is that not common? Mr. Roque seemed to think it
18 was unusual, but maybe you have more experience in that
19 area.

20 MR. COWAN: Well, your Honor, what I would say
21 about that is I think it is common, particularly from the
22 perspective of a lot of the times when you have an
23 independent assessor, there are communications that go both
24 ways, both with the government and both with, you know, the
25 person who is being assessed. I think it's pretty common

1 for -- and I'm sure -- you know, I can't personally speak
2 for what communications X has had with the assessor on this,
3 but I'm sure X had its own communications in terms of what
4 its expectation of procedures would be and what perhaps its
5 finding too that -- it would expect that everything would be
6 above board. I think those sort of communications aren't
7 that unusual for the FTC or for another party to propose,
8 here are ways you could go about something, and here's what
9 we expect you to find.

10 So -- I mean, just one last point on this, your Honor.
11 It's unclear why this -- all of this appears to be new at
12 the end of the day. I mean, to the extent that there was
13 some influence over EY, EY has now resigned.

14 THE COURT: Can you remind me who the new assessor
15 is?

16 MR. COWAN: It's FTI.

17 THE COURT: Okay. All right.

18 MR. COWAN: And so -- and there's no allegation
19 that the FTC has influenced FTI in the papers. I mean, just
20 briefly to touch on the other bucket, which is the
21 discovery, your Honor. The discovery request seem
22 completely reasonable in light of what X Corp characterized
23 as a fundamental transformation that occurred after Mr. Musk
24 took over. And I don't need -- I won't, unless your Honor
25 really would like me to go through the full list of all of

1 the changes that have occurred. But I will just say that it
2 appears that Mr. Musk has been the driving force behind
3 numerous changes at X Corp. On reply, X Corp seems to
4 suggest that some of this testimony was elicited by asking a
5 lot of questions about Mr. Musk, but that, in effect, is a
6 way to sidestep the reality that the testimony shows that
7 Mr. Musk has been the driving forth behind those changes.

8 THE COURT: Is the FTC seeking his deposition as
9 part of this lawsuit or as part of the administrative
10 proceeding before the FTC?

11 MR. COWAN: No, your Honor. If you read the very
12 first line of that order, that is pursuant to the
13 administrative order, and that's entirely consistent with
14 both the clear stipulated order and the administrative order
15 in terms of the allocation of powers.

16 THE COURT: In the government's view, do I have
17 discretion to block Musk's deposition, or is it your view
18 that I am powerless to do so because it's occurring in an
19 FTC proceeding?

20 MR. COWAN: That's right, your Honor. Because
21 it's -- under Kokkonen, that wouldn't be a part of this
22 lawsuit.

23 And just briefly, your Honor, I can touch on Mr. Musk's
24 testimony as well. Again, I think as I just said, the
25 deposition is a part of the administrative -- pursuant to

1 the administrative order. And so for all of the reasons
2 we've already discussed, that is separate from this Court's
3 (indiscernible). But even putting that aside, in terms of
4 the Apex doctrine too, there's just no authority, and X Corp
5 hasn't cited any authority where that's been applied to an
6 FTC investigation. And it's clear this is an investigation.
7 There are not active claims or defenses in this case at this
8 point. It's looking into conduct that has occurred since
9 the transformation -- the fundamental transformation that X
10 Corp self-described involving Mr. Musk.

11 With these briefings, your Honor, unless you have any
12 more questions, I -- we would ask that you rule in favor of
13 the government and deny the motion.

14 THE COURT: All right. Thank you.

15 X Corp, because you're the moving party, I want you to
16 have the last word, but -- so that means I'll invite Ernst
17 and Young --

18 MS. VANDRUFF: Your Honor, would you like for
19 Ernst and Young to be heard? I wasn't anticipating that the
20 counsel for Twitter would address the motion to compel
21 during (indiscernible). I'm happy to be heard whenever your
22 Honor (indiscernible).

23 THE COURT: I think now is a good time.

24 MS. VANDRUFF: Thank you, your Honor.

25 THE COURT: And then X Corp, you can respond to

1 both arguments at the end.

2 MS. VANDRUFF: Thank you, your Honor. Laura
3 VanDruff with Kelley Drye on behalf of Ernst and Young.

4 THE COURT: Good morning.

5 MS. VANDRUFF: Good morning, your Honor. So it's
6 worthwhile just at the outset to remind your Honor how we
7 got here on the motion to compel Ernst and Young.

8 So three weeks after Twitter filed its Rule 60 motion
9 before this Court, Twitter served Ernst and Young with its
10 subpoena. Both Ernst and Young and Twitter have offices in
11 San Francisco, but counsel for Twitter made the subpoena to
12 Ernst and Young returnable in Washington D.C. So as a
13 result, when Ernst and Young and Twitter were unable to
14 reach an agreement for substantive reasons we can address
15 here, Twitter moved to compel in the district of -- the
16 district court in D.C.

17 So it never sought leave of this Court to obtain
18 discovery of Ernst and Young, which is a non-party, to be
19 clear, even though it had previously sought leave of this
20 Court in its Rule 60 motion to obtain discovery of the
21 Federal Trade Commission. And EY -- Ernst and Young opposed
22 the subpoena for a variety of reasons, including that --
23 well, chief among them because it didn't have a legal basis.
24 So Judge Berman Jackson in a DDC transferred to this Court
25 with the parties' consent. And then Judge Kang, of course,

1 referred the matter to you. So there are a number of
2 reasons that we oppose the subpoena and that we find it to
3 be burdensome. But I do want to address Mr. Koffman's
4 arguments.

5 Now, counsel for the -- for Twitter -- well, let me say
6 this, that the -- at the deposition, which went a full day,
7 of Mr. Roque, counsel for the FTC -- and it was on the
8 counsel for the FTC's deposition notice, of course, the
9 subpoena -- Rule 45 subpoena for his deposition. A key
10 focus of the examination were the reasons for Ernst and
11 Young's termination of its engagement.

12 And I turn the Court's attention to Exhibit E, to our
13 opposition, which is an internal document. And it is under
14 seal, but it -- it's, of course, in our filing. And it
15 describes Ernst and Young's decision to terminate. It's an
16 internal memo that predates, of course, the submission. And
17 it describes the business reasons that Ernst and Young
18 decided to terminate. And none of them even allude to what
19 Mr. Koffman described here. Rather, it describes the
20 departure of Twitter employees responsible for privacy and
21 information security program, the availability of Twitter
22 employees with subject matter expertise, the impacts of
23 significant organizational changes at Twitter, and delay to
24 the project timeline requested by Twitter.

25 So -- you know, I submit, your Honor, that if -- that

1 the issues raised by Twitter's motion to compel Ernst and
2 Young are subsidiary to the issues raised by the Rule 60
3 motion and that your Honor's decision in the Rule 60 motion
4 and the subsidiary motion that relates to discovery really
5 do moot the issues here because, as Twitter raises in its
6 briefing relating to Ernst and Young, it would have been
7 satisfied with the documents that Ernst and Young provided
8 to the FTC. Those documents are equally available. If it
9 were to serve discovery on the FTC and if your Honor permits
10 discovery of the FTC, it can obtain those documents there.
11 For those reasons, Ernst and Young opposes -- continues to
12 oppose the subpoena served on EY. Thank you, your Honor

13 THE COURT: Thank you, counsel.

14 All right. X Corp, let's hear from you.

15 MR. KOFFMAN: Thank you, your Honor.

16 I'll start with the -- responding to some of the
17 government's arguments.

18 THE COURT: Why don't we begin with the big one,
19 the government's assertion that if X Corp violated the FTC's
20 consent order, the government could not seek contempt
21 sanctions in front of me.

22 MR. KOFFMAN: I don't know what to make of that,
23 your Honor. That's just so contrary to what I've seen the
24 FTC do in other matters where there's a consent order is
25 they've come back to the Court that entered that order and

1 sought contempt. So if they want to say that they don't
2 have the power to do that, then I think that that's a
3 significant concession. I don't think it's dispositive
4 because, ultimately, the consent order is part of the
5 stipulated order. It is clearly integrated into that
6 document. And they -- there was some discussion about, you
7 know, parties ought to be bound by the terms of their
8 contracts. Well, attachments to contracts are a part of
9 contracts. That's sort of a fundamental concept. So --

10 THE COURT: I was rereading the stipulated order,
11 and I can't find any language in it that requires Twitter to
12 comply with the FTC's consent order. Do you think I'm wrong
13 about that? And if so, you could direct me to that
14 language, but I don't see ordering language in there to that
15 effect.

16 MR. KOFFMAN: So I don't think that the -- there
17 is no sentence that says, "Twitter is enjoined to comply
18 with each and every term of the consent order." However,
19 obtaining an injunction to comply with the consent order was
20 the reason that they came here. That was one of the
21 remedies Mr. Cowan alluded to or he had said the FTC has the
22 power to issue cease and desist orders. If it wants
23 anything more -- if it wants a civil penalty of, like, \$150
24 million or if it wants an injunction that is enforceable
25 with contempt -- the contempt power of the Court, it has to

1 come to the Court. So that's what they did. So I'm a
2 little mystified by they're now saying, "Well, judge, you
3 know, there's -- that's a separate thing, and you didn't
4 really order that, and we can't enforce it." I find that to
5 be totally at odds with what I understand to have happened
6 here and what I've seen the FTC do in other cases.

7 So -- and I think Mr. Cowan alluded to that, excuse me,
8 when he was talking about the remedies that the FTC could
9 seek. He said, "Well, if they violate the consent order --
10 X violates the consent order, then the FTC can come back and
11 seek a civil penalty or an injunction or whatever else."
12 Those are his words. The "whatever else" is a contempt
13 sanction from this Court. It's asking this Court to compel
14 compliance on pains of contempt.

15 THE COURT: In the other situations that you
16 described where you saw the FTC move for contempt, was the
17 language in the Court's order different? Did it have
18 language in the Court's order that specifically ordered
19 compliance with the FTC order? Or maybe you don't know the
20 details of those cases?

21 MR. KOFFMAN: I don't have those in my fingertips.
22 I'm happy to submit something afterwards if it would be
23 helpful to the Court. But let me also just say, this is all
24 kind of beside the point. We're not -- and this sort of
25 parallel administrative judicial track is also beside the

1 point for the same reason, which is, we're not asking the
2 Court to rewrite the terms of the consent order. What we're
3 seeking is an order from the Court saying, "You FTC cannot
4 come back to me to seek my help forcing X to comply with
5 this consent order. The circumstances have changed. Your
6 conduct is a changed circumstance. You've rendered
7 compliance with this consent order substantially more
8 onerous, unworkable, and it would be against the public
9 interest to give you the benefits of the consent order when
10 you're engaging in this conduct that violates the consent
11 order." That doesn't implicate whether the consent order is
12 part of the stipulated order. It is, but that's sort of a
13 separate issue.

14 THE COURT: So my understanding under the
15 stipulated order is that there's only one very indirect way
16 that I could enforce the consent order, and that's the
17 stipulated order gives DOJ the right to access certain
18 documents that it otherwise wouldn't be able to because the
19 consent order otherwise only obligates X Corp to provide
20 them to the FTC. So I suppose if DOJ were being denied
21 access, they could ask me to order access. But other than
22 that, I think X Corp is likely already in this situation
23 where I couldn't enforce the administrative order or issue
24 contempt sanctions, just because I don't see anything in the
25 stipulated order that obligates Twitter to comply with the

1 consent order.

2 So in some ways, the relief that you say today at this
3 hearing that you want, maybe you already have.

4 MR. KOFFMAN: I'm heartened to hear the Court say
5 that. I appreciate Mr. Cowan's concession that they're --
6 they can't seek contempt. But I don't think it's -- I don't
7 think it's the relief -- it's entirely the relief we're
8 seeking, because what he did say is that if the FTC
9 determines that X violated the consent order, they're going
10 to seek new remedies. They're going to seek --

11 THE COURT: Well -- but he said that would be in a
12 new lawsuit.

13 MR. KOFFMAN: Well, that may be. I don't know. I
14 don't think there would be -- I think they would probably
15 amend their complaint in this case in the same way that they
16 amended their consent order in the prior matter, and it's
17 all part of the same docket. I don't know. That would be
18 up to them. But to the extent that they come back to the
19 Court seeking remedies for violation of the consent order, I
20 think it is squarely within this Court's power to decline to
21 provide them those remedies.

22 A few other points just to respond briefly, on the
23 tailoring issue, as -- Mr. Cowan, to his credit,
24 acknowledged that we did identify ways that would be more
25 tailored. We think that we're entitled to the entire

1 relief, but the independent assessor provisions and the
2 discovery provisions, the reason that that is more narrowly
3 tailored is because those are the provisions that the FTC
4 has been (indiscernible), and those are the ones that have
5 imposed these acute burdens on X Corp.

6 And as to this notion that, you know, we -- X Corp has
7 not been harmed and that because they got a substitute or
8 replacement independent assessor that issued a clean bill of
9 health, I don't think that that stands up to scrutiny.
10 There's the obvious due process violation that is ongoing
11 with a government agency engaging in this kind of conduct.
12 There's the millions of dollars that X has spent responding
13 to discovery demands. There's also the substantial amount
14 of new money that X Corp had to pay to get a new assessor up
15 to speed at warp speed to be able to do the independent
16 assessment. So I don't think that that stands up to
17 scrutiny.

18 Mr. Cowan offered what I take is an attempt at
19 defending the conduct. He said that we had applied some
20 hyperbolic spin. I mean, I read the transcript a few
21 minutes ago. I don't think it needs any spin.

22 THE COURT: Well, what's been your experience?
23 Mr. Cowan said that this type of expectation setting is not
24 necessarily unusual. Do you have a different view about
25 that?

1 MR. KOFFMAN: I absolutely do. I am -- if this is
2 normal -- if this is consistent with a consent order that
3 requires an independent assessment, the word "independent"
4 has no meaning. To say, "I felt as if the FTC was trying to
5 influence the outcome of the engagement before it had
6 started," under no set of circumstances is that normal or
7 acceptable. And if it is normal for the FTC, then maybe we
8 have a much, much bigger problem. I hope that this is just
9 a one-off case. But that, I don't think, can be accepted.

10 THE COURT: Well, Mr. Roque thought it was -- or
11 testified that it was unusual. Did he have experience in
12 these type of matters?

13 MR. KOFFMAN: I asked him that. He said that this
14 was -- he -- this is the only engagement that he has dealt
15 with that involved an independent assessment being appointed
16 by a governing agency. He did say for what it's worth that
17 he never heard of anything happening like this before, but
18 in their -- in defense of the FTC, he didn't really have a
19 significant basis (indiscernible).

20 There was a suggestion that, "Well, the FTC is
21 permitted to communicate with the assessor. I'm sure that X
22 Corp had communications with E and Y." Judge, can you
23 imagine if there were evidence that X Corp had been exerting
24 pressure on E and Y and saying you're only allowed to do X,
25 Y, and Z, and I expect this to be a clean bill of health?

1 My God. If the roles were reversed, it's beyond imagination
2 what they would be saying. They would -- I'm reasonably
3 certain they would have made a criminal referral for
4 contempt of Court and other sanctions. Obstruction, for
5 example. So I don't think that that stands up to scrutiny
6 either.

7 And, finally, on the deposition, there was some
8 discussion about whether this was pursuant to the FTC's
9 administrative power or this Court's power. Your Honor, we
10 included in the record the deposition notices. They say
11 District Court, Northern District of California. They have
12 this case caption. I'm not sure how they can say that it
13 was not issued in the context of this lawsuit or under the
14 authority of this Court. So I think that also fails.

15 On -- unless you have any questions, I'll move to the
16 motion to compel.

17 THE COURT: I don't, so please go ahead.

18 MR. KOFFMAN: So Ms. VanDruff referred to the fact
19 that the subpoenas were returnable to the District of
20 Columbia. I'm not sure what the point was there. But to
21 the extent your Honor wants to know --

22 THE COURT: Presumably that's where the documents
23 were.

24 MR. KOFFMAN: Well, it's not where the documents
25 were. It's where our associates were who would be receiving

1 the documents.

2 THE COURT: That issue doesn't matter to me.

3 MR. KOFFMAN: Okay.

4 THE COURT: But it made its way to me. So here we
5 are.

6 MR. KOFFMAN: Ms. VanDruff made an argument or
7 reference to the fact that we had sought leave to take
8 discovery from the FTC and that that somehow was a
9 concession of some sort. I'm not sure what we're supposed
10 to have been conceding there. But to the extent that
11 matters to your Honor, I think the papers are clear. We
12 sought discovery from the FTC before we made the motion.
13 They said, "No, go pound sand." And so we said to your
14 Honor, "You ought to compel them to respond to the
15 discovery, to the extent you're not satisfied on the record
16 as it is." So I'm not sure that that really makes a
17 difference. And then there was a reference to the fact that
18 the record suggests that E and Y terminated or resigned as
19 the assessor because of Twitter's -- X Corp's inability to
20 supply the resources needed to conduct the assessment. This
21 is completely irrelevant to the discovery we're seeking and
22 why we're seeking it. And I explained earlier, it's because
23 there's significant evidence in the record, the limited
24 record that we have so far, suggesting that the FTC has
25 engaged in extraordinary misconduct and seeking to weaponize

1 an independent assessor by twisting their arm. Why E and Y
2 resigned is really neither here nor there. But I will say
3 that -- and as I proffered --

4 THE COURT: I felt like there was at least some
5 suggestion in your motion that maybe the true reason for the
6 resignation was the alleged bullying and intimidation?

7 MR. KOFFMAN: And -- yes, there is some
8 suggestion. And I proffered to your Honor before what I
9 believe the discovery would show about that other meeting,
10 that when told again what to do by the FTC, E and Y said,
11 "If that's what you want us to do, we would probably have to
12 resign." And I think the fact -- and look, I get it. I
13 don't blame Ernst and Young for not wanting to be here. We
14 don't want to be here either, your Honor, but we didn't
15 bring us here. It was the FTC's conduct that brought us
16 here, and we're following the evidence where it goes so that
17 we can figure out what happened here and what the remedy is.

18 But the -- so the fact that Ernst and Young's formal
19 memorandum put all the blame on Twitter is equally
20 consistent with the coercive conduct by the FTC succeeding
21 and them being afraid of being at odds with the FTC and
22 knowing that this may become subject to discovery and
23 wanting to have a record that doesn't blame the FTC because
24 they continue to do business with the FTC.

25 And this is not wild speculation. There's in the

1 record, and it's -- I don't have my fingertips where it is
2 in the record, but I can find it in a second. But we
3 included an instant message communication between Mr. Roque
4 and another managing director from Ernst and Young talking
5 about the resignation. And what one of the managing
6 directors says -- what he says to Mr. Roque is,

7 "I think you need to play out that
8 scenario. As I noted in my e-mail last
9 night, I think the FTC will cure both of
10 those objections. Then our veil will be
11 gone, and it will be clear we are
12 resigning just because we don't want to
13 be involved, not the two cited reasons."

14 So -- I mean the notion that E and Y can rely on a
15 memorandum when we have evidence that they're engineering
16 what's going to go on that memorandum is, I think, not sound
17 reasoning.

18 Again, it's really not the point. The point is that
19 they have material additional evidence that bears directly
20 on the issues that are before the Court. And to the extent
21 the Court is not prepared to issue the order that we've --
22 that we're seeking right now, at a minimum, we ought to have
23 an opportunity to pursue this.

24 THE COURT: Alrighty. Well, thank you, counsel.

25 The matter is submitted, and we're adjourned.

1 MR. KOFFMAN: Thank you, your Honor.

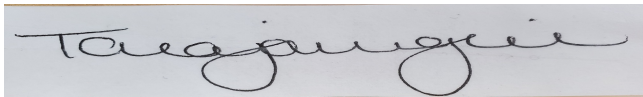
2 THE CLERK: Thank you, everyone. We're off the
3 record. The court is in recess.

4 (Proceedings concluded at 11:54 a.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A rectangular box containing a handwritten signature in cursive script, which appears to read "Tara Jungi".

Echo Reporting, Inc., Transcriber

Saturday, November 18, 2023